Act, recently enacted in several states.[13] It may undoubtedly satisfy the demands of justice in a number of particular instances. But it is inconsistent with the actual meaning of the words of the Statute, and consequently must stand condemned. A sale is a transfer of property for a pecuniary consideration.[14] Any contract, therefore, which involves the transfer of goods for a pecuniary consideration is a contract for the sale of goods under the Statute. This is the English rule, and seems to be the most satisfactory determination of the question.[15]

A recent case, *Morse* v. *Canaswacta Knitting Co.* (App. Div. 1912) 139 N. Y. Supp. 634, affords an illustration of the extent to which the courts will go in their attempt to prevent injustice in particular cases through the application of the Statute. The contract was for a belt to be manufactured in a special manner by a stranger to the contract. It was held, one judge dissenting, that the contract did not fall within the terms of the Statute, because the belt was of a special pattern and could not be disposed of in the general market.[16] Assuming that where work is to be done by the vendor, the contract is one for work and labor and not for the sale of goods, it would still be hard to justify the decision of the case, where the vendor was merely to procure a chattel from a third party and deliver it to the vendee. This cannot be called a contract for work and labor, and in fact, the court did not so designate it, but rested its decision on the ground of hardship to the vendor. The opinion of the majority of courts is that a contract for the transfer of goods to be manufactured by a third party is one for the sale of goods, and within the Statute.[17] But where the goods are to be made in accordance with a special order, there are authorities which support the holding in the principal case.[18] It has been aptly suggested by a former New York court[19] that such an obvious misconstruction of the language of the Statute of Frauds amounts practically to a repeal, which might better be left to the discretion of the legislature.

CONTROL OF EQUITY OVER ELECTIONS.—No principle is more frequently stated than that equity will not interfere to protect or enforce a purely political right, and it is generally recognized that elections

---

[13]Uniform Sales Act § 4.

[14]2 Bl. Comm. *446; 2 Kent, Comm. *468.

[15]Lee *v.* Griffin, *supra;* Isaacs *v.* Hardy (1884) Cab. & E. 287; Canada Bank Note Co. *v.* Toronto Ry. (1895) 22 Ont. App. 462; Burrell *v.* Highleyman (1888) 33 Mo. App. 183; see Cooke *v.* Millard, *supra,* where the court approves the English rule, but refuses to depart from the principles of former decisions. The fact that work and labor are involved in the contract, as well as the transfer of property in goods, is immaterial, as it is the universal rule that where an entire contract comes partly under the Statute of Frauds it is wholly unenforceable. Atwater *v.* Hough (1861) 29 Conn. 508; 3 Parsons, Contracts (9th ed.) *53.

[16]It would seem that the court was here applying the rule of the Uniform Sales Act, which has been adopted in New York, Personal Property Law § 85, though no mention was made of this in the opinion.

[17]Milar *v.* Fitzgibbons (N. Y. 1881) 9 Daly 505; Smalley *v.* Hamblin (1898) 170 Mass. 380; Atwater *v.* Hough, *supra;* see Pawelski *v.* Hargreaves (1885) 47 N. J. L. 334.

[18]Bird *v.* Muhlinbrink (S. C. 1845) 1 Rich. L. 199; Forsyth & Ingram *v.* Mann Bros. (1895) 68 Vt. 116.

[19]See Robertson *v.* Vaughn (N. Y. 1850) 5 Sandf. 1.

fall within the operation of the principle.[1] The reasons usually assigned for the denial of equitable relief in such cases are that there has always been an adequate method for trying title to elective offices by the common law writ of *quo warranto*;[2] that the use of the injunction in political affairs is attended with the danger of great practical inconvenience;[3] and finally, that it is deemed an encroachment on legislative authority.[4] Of course, if the reasons are wanting in a particular case, the principle should not be applied.

The question rises strikingly when the vote is taken, not for the election of officers, but to determine the will of the majority on propositions of local interest, such as the removal of a county seat, municipal subscription to railroad bonds, or local option. In these cases the remedy of *quo warranto* is not available,[5] and if the adequacy of the relief at law is the determining reason for the rule, then equity should be free to purge the polls. So in a recent case, where the votes at a local option election had been fraudulently procured and reported by the election officials, the court decided that it was within the jurisdiction of equity to enjoin the issue of license certificates in accordance with the pretended result of the election. *Patterson* v. *People ex rel. Parr* (Colo. 1913) 130 Pac. 618.[6]

Beginning with the assumption that matters pertaining to elections are exclusively within legislative competence,[7] it has been determined in many jurisdictions that contests as to the validity of elections are not cases "arising in equity," within the meaning of that phrase in the state constitution;[8] and that although there is no remedy at law, the courts of equity are powerless because of their limited jurisdiction.[9] But the same courts have qualified this rule, and have held that an injunction will be granted where irreparable damage or the expenditure of public funds will result from the holding of an election which is illegal, either because some essential prerequisite has been omitted,[10]

---

[1]State *ex rel.* McCaffery *v.* Aloe (1899) 152 Mo. 466; Walton *v.* Develing (1871) 61 Ill. 201; see note to the case of U. S. Voting Machine Co. *v.* Hobson (Ia. 1906) 10 Ann. Cas. 976.

[2]High, Extraordinary Legal Remedies (3rd ed.) § 619.

[3]See Hardesty *v.* Taft (1865) 23 Md. 512; Dickey *v.* Reed (1875) 78 Ill. 261.

[4]See Parmeter *v.* Bourne (1894) 8 Wash. 45; Fletcher *v.* Tuttle (1894) 151 Ill. 41.

[5]High, Extraordinary Legal Remedies (3rd ed.) §§ 591, 618.

[6]*Accord,* Shaw *v.* Cir. Ct. (1911) 27 S. Dak. 49; and see Ulrich *v.* Clement (1910) 124 N. Y. Supp. 133.

[7]See State *v.* Police Jury (1889) 41 La. Ann. 846; Harrell *v.* Lynch (1885) 65 Tex. 146.

[8]Markert *v.* Sumter County (1910) 60 Fla. 328; see note to this case in 1912 C. Ann. Cas. 690; Dillon, Municipal Corporations (5th ed.) § 379, n. 2, but it must be observed that these broad statements are made with reference to the general case of election of officers where an adequate remedy exists at law. Markert *v.* Sumter County, *supra.*

[9]Parmeter *v.* Bourne, *supra;* Hester *v.* Bourland (1906) 80 Ark. 145; Hamilton *v.* Carroll (1896) 82 Md. 326; see 1 Pomeroy, Eq. Jur. (3rd ed.) § 35.

[10]Marsden *v.* Harlocker (1906) 48 Ore. 90; Sweatt *v.* Faville (1867) 23 Ia. 321; Krieschel *v.* City Commrs. (1895) 12 Wash. 428; Lanier *v.* Padgett (1882) 18 Fla. 842.

or because the law providing for the election is unconstitutional.[11] And this relief will also be given where the constitution provides that the proposition in question should not be determined except by the concurring votes of a certain proportion of the electors.[12] But in these instances the primary purpose is to protect constitutional and property rights, and the protection of political rights is merely incidental. This is consistent with the treatment of other *ultra vires* acts of the legislature by courts of equity,[13] and would seem to indicate that in the opinion of the majority of the courts, the basic reason for equity's refusal to meddle in political affairs is because it would be an invasion of the powers of the law-making department. On principle, however, it must be admitted that the line has been too broadly drawn. A sound distinction exists between interference with the holding of elections and inquiries into the legality of the conduct of the election officials. The former was always regarded, at common law, as a legislative function, but the latter was judicial,[14] and the fact that *quo warranto* was limited to inquiries into the elections of officers means no more than that popular referendum of propositions was unknown when the writ was established. Consequently, where there is no provision for relief at law, equitable interference is a valid exercise of the judicial function and properly within the jurisdiction granted by the state constitutions.[15]

But the real difficulty with the principal case is that it overlooks the fact that the common law provides an adequate remedy in the writ of mandamus.[16] It is well settled that if nothing appears to the contrary the duties of a board of election canvassers are wholly ministerial.[17] The writ of mandamus will always lie to compel the performance of a ministerial duty where no other legal or statutory remedy is available;[18] and it is no objection to mandamus proceedings against a board of canvassers that a result has been declared,[19] for if in the performance of their duty an erroneous result was reached it was regarded as no performance,[20] and *a fortiori* if the result was fraudulent they should be compelled to reconvene and discharge their

---

[11]See Conner *v.* Gray (1906) 88 Miss. 489; Tolbert *v.* Long (1910) 134 Ga. 292.

[12]Boren *v.* Smith (1868) 47 Ill. 482; Lindsay *v.* Allen (1904) 112 Tenn. 637, 660; Gibson *v.* Board of Supervisors (1889) 80 Cal. 359.

[13]Board of Liquidation *v.* McComb (1875) 92 U. S. 531; State *ex rel.* Forsyth *v.* Judge (1890) 42 La. Ann. 1104. This applies only when there is no remedy at law. Gowdy *v.* Green (1895) 69 Fed. 865.

[14]High, Extraordinary Legal Remedies (3rd ed.) § 603.

[15]See 1 Pomeroy, Equitable Remedies (3rd ed.) § 263.

[16]See People *ex rel. v.* County Commrs. (1882) 6 Colo. 202; Calaveras County *v.* Brockway (1866) 30 Cal. 326; see McWhirter *v.* Brainard (1875) 5 Ore. 426.

[17]People *ex rel.* Derby *v.* Rice (1891) 129 N. Y. 461. They have no power to go behind the returns and controvert the vote. Coll *v.* Canvassers (1890) 83 Mich. 367; McCrary, Elections (4th ed.) § 412.

[18]High, Extraordinary Legal Remedies (3rd ed.) §§ 49, 55-60; Chumasero *v.* Potts (1875) 2 Mont. 242; People *v.* Shiellein (1884) 95 N. Y. 124.

[19]Roemer *v.* Canvassers (1892) 90 Mich. 27; see Maxey *v.* Mack (1875) 30 Ark. 472.

[20]13 COLUMBIA LAW REVIEW 351.

duties lawfully.[21] Had the statute provided that the board of canvassers should have any judicial or discretionary powers then mandamus could not have been issued;[22] but no more could an injunction.[23] For is must be inferred that the legislature, by providing for no appeal from their decision, intended that their findings should be conclusive;[24] and any judicial interference with the determination would be a violation of the doctrine of separation of powers.[25] It seems, therefore, that the writ of mandamus[26] furnishes an adequate and permanent remedy and that the jurisdiction of equity in the circumstances of the principal case, should have been limited to the issuing of a preliminary injunction to prevent irreparable injury pending the outcome of mandamus proceedings.

DOUBLE JEOPARDY IN AN ACTION FOR A PENALTY.—The tendency of modern legislation to supplement the punishment of fine and imprisonment provided for a misdemeanor with that of a penalty or a forfeiture, recoverable in a separate action at the suit of the state, has provoked a corresponding effort to nullify such additional punishment by declaring the suit for its recovery to fall within the rule against double jeopardy. Evidently, this defense is based upon the theory that the immunity from double jeopardy is applicable to property rights, because an action to declare a forfeiture is strictly an action *in rem,* and the failure to satisfy a judgment for a penalty does not involve imprisonment,[1] as in the case of non-payment of a fine.[2] This view, however, finds little support in the considerations surrounding the origin of the maxim, *Nemo debet bis puniri pro uno delicto.* This ancient immunity was established at a time when punishments were corporal, rather than pecuniary,[3] and were extremely severe.[4] Conviction for a felony was always attended by the forfeiture of the convict's lands

---

[21]It seems that mandamus will lie not only to compel an officer to perform his duty but also to show him what is his duty. High, Extraordinary Legal Remedies (3rd ed.) §56a. See State *ex rel.* Metcalf *v.* Garesche (1877) 65 Mo. 480; Gleason *v.* Blanc (N. Y. 1895) 14 Misc. 620; State *ex rel. v.* Commrs. (1886) 35 Kan. 640.

[22]Halloran *v.* Carter (1891) 13 N. Y. Supp. 214.

[23]Weil *v.* Calhoun (1885) 25 Fed. 865; Sanders *v.* Metcalf (1873) 1 Tenn. Ch. 419; Mendenhall *v.* Denhan (1895) 35 Fla. 250.

[24]See Skrine *v.* Jackson (1884) 73 Ga. 377; Atty. Genl. *v.* Supervisors (1876) 33 Mich. 289.

[25]Harrell *v.* Lynch, *supra;* see Lumber Co. *v.* Harrison County (1906) 89 Miss. 171.

[26]The relator in mandamus proceedings need not show that he has any legal or special interest in the result, it is sufficient to prove that he is a citizen. High, Extraordinary Legal Remedies (3rd ed.) § 431; see note to case of Brewster *v.* Sherman (Mass. 1907) 11 Ann. Cas. 419.

[1]*In re* Sorenson (1874) 29 Mich. 475; *In re* Hanson (1853) 36 Me. 425.

[2]*Ex parte* Karlson (1911) 160 Cal. 378.

[3]2 Pollock & Maitland, History of English Law (2nd ed.) 452-3.

[4]The phrases "jeopardy of life or limb" and "jeopardy of life or liberty" common to several State constitutions, Const. Penn. Art. 1, § 10; Const. Mo., Art. 2, § 23, seem to indicate that the prohibition was directed against repeated interferences with the person of the defendant.